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RECEIVABLES FINANCING

Revised articles of draft uniform rules

on assignment in receivables financing

Note by the Secretariat

CONTENTS

	Page
INTRODUCTION	3
CHAPTER I. SCOPE OF APPLICATION AND GENERAL PROVISIONS	4-15
Article 1. Scope of application	4
Article 2. Definitions	9
Article 3. International obligations of the [contracting] [enacting] State	13
Article 4. Principles of interpretation	14
CHAPTER II. FORM AND CONTENT OF ASSIGNMENT	15-18
Article 5. Form of assignment	15
Article 6. Content of assignment	15
Article 7. Bulk assignment and assignment of single receivables	16
Article 8. No-assignment clauses	17
Article 9. Transfer of security rights	18

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Page

CHAPTER III. RIGHTS, OBLIGATIONS AND DEFENCES 19-30

Article 10. Determination of rights and obligations 19
Article 11. Warranties of the assignor 20
Article 12. Assignee's right to notify the debtor and to request payment . . . 21
Article 13. Debtor's duty to pay 22
Article 14. Defences and setoffs of the debtor 24
Article 15. Modification of the original contract 25
Article 16. Waiver of defences 26
Article 17. Recovery of advances 27
Article 18. Priority 27
Article 19. Payment to a specified bank account and priority 30

CHAPTER IV. SUBSEQUENT ASSIGNMENTS 31-32

Article 20. Subsequent assignments 31

CHAPTER V. CONFLICT OF LAWS 32-35

Article 21. Law applicable to the relationship between assignor and assignee 33
Article 22. Law applicable to the relationship between assignee and debtor . 34
Article 23. Law applicable to priority 34

INTRODUCTION

1. At its twenty-eighth session, in 1995, the Commission discussed the topic of assignment in receivables financing and entrusted the Working Group on International Contract Practices with the work of preparing a uniform law on this topic. [1/]

2. The Working Group commenced this task at its twenty-fourth session by reviewing a number of draft uniform rules set forth in a report of the Secretary-General (A/CN.9/412). At the conclusion of the session, the Working Group requested the Secretariat to prepare a revised version of the draft uniform rules on the basis of the deliberations and decisions of the Working Group (A/CN.9/420, para. 204).

3. The present note contains revised articles of the draft uniform rules and explanatory remarks to the draft provisions. Additions and modifications to the text are indicated by underlining. General reference is made to the relevant portions of the Working Group report (A/CN.9/420).

[1/] Official Records of the General Assembly, Fiftieth Session, Supplement No. 17 (A/50/17), paras. 374-381.

DRAFT UNIFORM RULES ON ASSIGNMENT IN RECEIVABLES FINANCING

Remarks:

Title

After having completed its consideration of the scope of application of the draft uniform rules, the Working Group might wish to consider their title.

CHAPTER I. SCOPE OF APPLICATION AND GENERAL PROVISIONS

Article 1. Scope of application

(1) [This Convention] [This Law] applies to assignments of international receivables [and to international assignments of receivables made]

Variant A: for financing or any other commercial purposes,

Variant B: in the context of financing contracts,

(...)

(a) [if the assignor and the debtor have their places of business in a Contracting State] [if the assignor or the debtor has its place of business in this State]; or

[(b) if the rules of private international law lead to the application of the law of a Contracting State].

(...)

(2) A receivable is international if the places of business of the assignor and the debtor are in different States. [An assignment is international if the places of business of the assignor and the assignee are in different States].

References: A/CN.9/420, paras. 19-32.
A/CN.9/420, draft article 1(1).

Remarks:

Substantive scope of application/ financing

1. At its previous session, the Working Group considered the question whether the scope of application of the text should be limited by reference to the "financing" or, alternatively, to the "commercial" purpose of the assignment. Variant A avoids drawing a distinction between "financing" and "commercial" purposes, since many transactions, which at first sight seem to be

commercial, are in reality a form of financing. In addition, a reference to only the financing purpose of an assignment might inadvertently result in excluding from the scope of the draft uniform rules transactions which, although they are inherently of a financing nature, are at times structured so as to serve general commercial purposes, e.g. factoring for accounting or insurance purposes. Moreover, referring to the purposes of the assignment would introduce uncertainty in relation to the application of the draft uniform rules, since their application would depend on an interpretation of the assignment with a view to ascertaining its purpose.

2. One of the reasons cited at the previous session of the Working Group for limiting the scope of the draft uniform rules to assignments for "financing" purposes was the need to avoid any overlap with the UNIDROIT Convention on International Factoring ("the Factoring Convention"). However, it should be noted that, even if the draft uniform rules were to apply only to assignments for financing purposes, they would overlap with the Factoring Convention, since assignment in the context of factoring would normally be an assignment for financing purposes. It is, therefore, submitted that the question of the relationship of the draft uniform rules and the Factoring Convention, or other international texts, should rather be dealt with in a special rule dealing with the international obligations of the State enacting the draft uniform rules (draft article 3).

3. Variant B is intended to define the scope of the draft uniform rules in an equally broad, but at the same time practical, way. In addition, it is aimed at covering both assignments that form an integral part of the financing contract (e.g., assignment in factoring transactions) and assignments that are made pursuant to a distinct contract (e.g., assignments in project financing transactions). Such an approach is consistent with the approach taken by the Working Group at its previous session to facilitate receivables financing practices with a view to increasing the availability of credit (A/CN.9/420, paras. 16 and 41).

4. The exact meaning of the financing contract could be defined along the lines of draft article 2(2), or be left undefined. It should be noted that a definition of "financing contract", which could enhance certainty, might be difficult to achieve and, in addition, would run the risk of excluding some practices. On the other hand, while leaving that term undefined might introduce some uncertainty as to its exact meaning, it would have the advantage of recognizing in the draft uniform rules all the different financing practices that have already developed or might need to be developed in order to address the need for increased access to lower cost credit.

5. The Working Group might wish to consider further the question of the types of financing practices to be covered. Should the Working Group decide to take a broad approach, the question should be considered whether the same provisions could apply to all financing practices, or whether, apart from some general provisions that would apply to all practices, certain additional provisions would need to be prepared aimed at addressing the needs of particular practices. From a methodological point of view, the Working Group might wish to address all practices at the same time or, alternatively, to direct its attention initially to a particular practice or practices and to consider at a later stage whether the draft uniform rules could find application to other practices as well.

6. It should be noted that, at the previous session of the Working Group, it was indicated that there were sufficient differences between certain practices to justify their different treatment in the draft uniform rules. For example, in the context of the discussion on article 9(2) of the earlier

draft, the view was expressed that a clear discharge rule for the debtor paying the assignee before notification of the assignment could have an adverse impact on practices, such as securitization, in which the debtor was expected to continue making payments to its initial creditor even after assignment (A/CN.9/420, para. 108).

7. In addition, in the context of its discussion on article 12 of the earlier draft, the Working Group was agreed that the exceptions contained in article 10 of the Factoring Convention (recovery of advance payments made by the debtor to the assignee in case of unjust enrichment or bad faith on the part of the assignee) should not be included in the respective article of the draft uniform rules, because those types of exceptions were peculiar to the factoring contract and reproducing them in the draft uniform rules could create obstacles to other receivables financing practices (A/CN.9/420, para. 145). Moreover, special rules might need to be developed if the assignment of partial and undivided interests in receivables were to be covered (A/CN.9/420, paras. 180-184).

Internationality

8. The chapeau of draft article 1 reflects the approach generally supported by the Working Group at its previous session that the draft uniform rules should cover both international and domestic assignments of international receivables (A/CN.9/420, para. 26). With regard to domestic assignments of international receivables in which the assignor and the assignee would be located in one country and the debtor would be located in another, the Working Group might wish to avoid dealing with domestic relationships (e.g., the relationship between the assignor and the assignee) and to deal exclusively with international relationships (e.g., the relationship between the assignee and the debtor and the relationship between the assignee and the assignor's creditors, to the extent that it is international). It should be noted that the Factoring Convention focuses on the internationality of the original contract and applies to assignments of international receivables only (article 2.1).

9. The reference to international assignments, which would result in the draft uniform rules covering international assignments of domestic receivables, has been included in order to reflect a suggestion made at the previous session of the Working Group. It appears within square brackets since that suggestion raised a number of concerns, including that: it would be undesirable for the domestic debtor, in particular if it were a consumer, to find its legal position subjected to a different legal regime merely because the domestic creditor chose to assign its receivables to a foreign assignee; such an approach might inadvertently lead to disunification and uncertainty, since domestic receivables would be governed by a different legal regime depending on whether they were assigned to a foreign assignee or not, which the debtor could not predict at the time of the conclusion of the original contract; attempting to cover domestic receivables could negatively affect the acceptability of an international registry since States would have more difficulties in accepting international registration of domestic receivables (A/CN.9/420, paras. 27-29 and 159).

10. On the other hand, coverage of international assignments of domestic receivables could facilitate receivables financing by providing domestic traders with easier access to international financial markets (e.g., securitization of credit card receivables). In addition, such an approach could enhance competition among financing institutions with the beneficial result of lowering the cost of credit. Moreover, the wider the scope of application of the rules the higher the degree of uniformity and certainty that could be achieved.

11. In determining which approach to follow, the Working Group might wish to weigh the potential disadvantage for the debtor of having to pay a foreign creditor against the potential advantage both for the assignor and for the debtor of having increased access to lower cost credit. In addition, in order to reduce the potential negative impact of an international assignment on the interests of the domestic debtor, in particular if the debtor were a consumer, the Working Group might wish to consider dealing exclusively with commercial relationships (e.g., the relationship between the assignor and the assignee).

12. An alternative to that approach might be to cover the assignee-debtor relationship as well but to reconsider a number of provisions in order to address concerns about consumer protection. For example, in a consumer context: no-assignment clauses might need to be upheld; waiver of defences might be invalidated or made more difficult; the debtor's protection might need to be further strengthened; the approach based on payment to a bank account or post office box might need to be considered in more detail (draft article 19); and additional provisions dealing with matters such as priority between foreign and domestic assignees of domestic receivables or other domestic creditors of the assignor might have to be developed.

Territorial scope of application

13. Subparagraph (a) is intended to reflect the view expressed at the previous session of the Working Group that the assignee does not need to have its place of business in a State that has adopted the draft uniform rules, since in cross-border assignments the assignee would tend to seek to enforce the assignment in the State where the debtor or the assignor is located (A/CN.9/420, para. 30). The Working Group might wish to reconsider this approach since there may be cases in which the law of the State in which the assignee has its place of business might be relevant, if it is the applicable law and provides for the courts of that State to have jurisdiction (assignments often contain a clause giving jurisdiction to the courts of the country of the assignee). It should be noted that the Factoring Convention requires that the assignor and the debtor have their places of business in different States, and that those States and the State in which the assignee has its place of business be Contracting States (article 2.1(a)).

14. Subparagraph (b) has been placed within square brackets pursuant to a concern expressed at the previous session of the Working Group that referring to private international law rules for the purpose of determining the scope of application of the draft uniform rules was bound to introduce uncertainty (A/CN.9/420, para. 31). It may be noted that this provision was drawn from article 1(1)(b) of the United Nations Convention on Contracts for the International Sale of Goods ("the Sales Convention").

Convention or model law

15. The current version of the draft uniform rules contains a number of alternative draft provisions requiring a choice to be made between the form of a convention or of a model law (e.g., paragraphs (1)(a) and (b) of draft article 1, draft article 3 and draft articles 21-23). The first bracketed language contained in paragraph (1)(a), as well as paragraph (1)(b) would be suitable, if a convention were to be prepared. If work by the Commission were to take the form of a model law, the second bracketed language in paragraph (1)(a) could be retained, while paragraph (1)(b) would be inappropriate.

16. In view of the above, the Working Group might wish to consider, at an appropriate time during the present session, the form of the text to be prepared with a view to adopting a working assumption. The working assumption could be reviewed at a later stage in light of the content of the draft articles.

17. Generally speaking, in favour of a convention it could be argued that it would create a higher degree of uniformity and certainty and that it would be more suitable if a world registry were to be established, while a model law would allow States more flexibility in adjusting the draft uniform rules to their domestic legislation (for a brief discussion of registration in the context of a convention or a model law, see draft article 18, remark 8).

Mandatory or non-mandatory character of the rules

18. The Working Group might wish to address the additional question whether the parties to the assignment (assignor-assignee), or the parties to the original contract as well (assignor-debtor), should be allowed to opt out of the draft uniform rules, in whole or in part.

19. A number of arguments could be raised against an opting-out clause, including that: third parties would not be able to verify whether the assignor had made prior assignments in which the assignor and earlier assignees might have excluded the application of the draft uniform rules; it would be inappropriate to allow the parties to the assignment or to the original contract to determine the law governing the transfer of property on receivables, which is normally not within the purview of party autonomy; and that an opt-out clause should be unnecessary, since it would be rather unlikely that the assignor, the assignee or the debtor would wish to exclude the application of rules which would be aimed at increasing the availability of credit.

20. On the other hand, in favour of an opting-out clause, it may be argued that: the debtor, to the extent that its legal position might be changed as a result of the assignment, would have a legitimate interest in excluding the application of the draft uniform rules; and that a mandatory regime might be less acceptable than a regime which would allow parties to derogate from it.

21. It may be noted that under article 3 of the Factoring Convention both the parties to the factoring contract and the parties to the original contract may exclude the application of the Convention as a whole. However, under article 3(b) of the Factoring Convention, exclusions contained in the original contract are valid towards the factor (assignee) only to the extent the factor was given prior written notice of the exclusion.

22. If the draft uniform rules were to adopt an opting-out approach, the Working Group might wish to consider addressing the conflict of priority between assignees the rights of whom would be covered by the draft uniform rules and assignees whose rights might be subject to a different legal regime as a result of the exclusion of the application of the rules.

Article 2. Definitions

For the purposes of this [Convention] [this Law]:

(1) "Assignment" means the agreement to transfer receivables from one party ("assignor") to another party ("assignee") (...), by way of sale, by way of security for performance of an obligation, or by any other way except delivery and/or endorsement of a negotiable instrument (...).

[(2) "Financing contract" means the contract in the context of which the assignor assigns its receivables to the assignee, while the assignee provides financing or other related services to the assignor or another person (...). Financing contracts include, but are not limited to, factoring, forfaiting, refinancing, in particular securitization, and project financing].

(3) "Receivable" means any right (...) to receive or to claim the payment of a monetary sum in any currency [or commodity easily convertible into money].

(a) "Receivable" includes, but is not limited to:

(i) any right arising from a contract ("the original contract") made between the assignor and a third party ("the debtor");

(ii) future receivables; [and

(iii) partial and undivided interests in receivables].

(b) Receivable" does not include: [...]

(4) "Future receivable" means:

(a) a receivable which, while arising from a contract existing at the time of assignment, is not due at the time of assignment or has not yet been earned by performance; and

(b) a receivable that might arise from a contract expected to be concluded after the conclusion of the assignment.

[(5) "Consumer receivable" means a receivable arising from a transaction made for personal, family or household purposes.]

(6) "Writing" means any form of communication which preserves a complete record of the information contained therein and provides authentication of its source by generally accepted means or by a procedure agreed upon by the sender and the addressee of the communication.

(7) If a party has more than one place of business, the place of business is that which has the closest relationship to the relevant contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the time of the conclusion of that contract. If a party does not have a place of business, reference is to be made to its habitual residence.

References: A/CN.9/420, paras. 33-44 and 180-184.
A/CN.9/420, draft articles, 1(2), 2 and 9(4).

Remarks:

"Assignment"

1. The definition of "assignment" has been revised in order to refer to the agreement between the assignor and the assignee, instead of to the actual transfer, since that result is accomplished by the revised draft articles 6 and 7 ("an assignment transfers"). This revision, as well as the corresponding revision of draft articles 6 and 7, is intended to overcome the difficulty of clearly distinguishing between the notions of validity and effectiveness of assignment indicated during the discussion of the provision on bulk assignments which took place during the previous session of the Working Group. It should be noted that, under the current definition of "assignment", transfers of receivables by operation of law, which might involve public policy considerations, would be excluded from the scope of application of the draft uniform rules.

2. The exclusion of receivables transferred by way of endorsement of a negotiable instrument is in line with the approach taken by the Working Group at its previous session that the entire range of assignment-related practices should be covered with the exception of transfers of receivables by way of endorsement (A/CN.9/420, paras. 38-39). It would seem that, for the same reasons cited by the Working Group, transfers of receivables by way of delivery of a bearer document would also need to be excluded. The reference to "financing" was deleted pursuant to reservations expressed at the previous session of the Working Group as to the necessity of making "financing" an element of the definition of "assignment" (A/CN.9/420, paras. 40-43). The reference to the financing contract or to the financing purpose of the assignment in draft article 1 should be sufficient for the purpose of limiting the scope of the draft uniform rules to assignments made in a financing context.

3. The Working Group might wish to define the terms "assignor", "assignee" and "debtor" in more detail, in particular in order to clarify whether such persons could be individuals, companies, governments or governmental agencies, domestic or foreign and existing or not at the time of assignment. It should be noted that, in some legal systems, in order to clearly distinguish the borrower under the financing contract (i.e. the assignor) from the debtor of the assigned receivables, the term "debtor" is used to indicate the former, and the term "obligor" to indicate the latter. In addition, it should be noted that, in securitization transactions, the term "originator" is often used to distinguish the initial assignor, i.e. the person in whose favour the receivables arose from the original transaction, from the subsequent assignor who assigns the receivables to a special purpose corporation, wholly owned by the subsequent assignor.

"Financing contract"

4. Paragraph (2) is aimed at describing the financing contract in a broad and flexible way, so as to encompass a wide range of practices in which the assignee provides financial or other similar services. In addition, paragraph (2) is intended to cover both assignments that form an integral part of the financing contract (e.g., factoring) and assignments that are made pursuant to a distinct contract (e.g., project financing). The reference to the "assignor or another person" is aimed at covering the case in which the assignor might not be the borrower under the financing contract.

While the reference to some financing contracts might be useful, to the extent that it is only indicative and non-exhaustive, it might be inappropriate in that it might be misread as being exhaustive or might appear to rely on artificial distinctions that are difficult to draw in practice.

5. An alternative approach might be to avoid defining the financing contract altogether, leaving its exact meaning to the parties and to the applicable national law. Such an approach, while inherently more flexible, might introduce uncertainty as to the scope of application of the draft uniform rules.

"Receivable"

6. Paragraph (3) has been revised in response to suggestions made at the previous session of the Working Group. The term "creditor" has been deleted since it might inadvertently result in restricting the range of persons covered. No reference to the right "of a person" was inserted, since such a reference might introduce uncertainty with regard to the question whether cases would be covered in which a receivable might be owed jointly and/or severally to more than one person or to an entity which might not have legal personality under the national applicable law. The words "to receive" were retained in order to cover cases in which the creditor receives payment without claiming it. The reference to documentary receivables has been deleted from the definition of the term "receivable" and replaced by a reference in the definition of the term "assignment" to the way in which such receivables might be transferred (A/CN.9/420, para. 38).

7. The notion of the term "receivable" has been limited to contractual receivables. Under such an approach, receivables arising from a wide range of contracts would be covered (e.g., receivables arising from leases, licences and concession agreements, from which revenues for project financing transactions may often flow). However, receivables arising from torts, which might involve public policy considerations, would be left outside the scope of the text. The language inserted at the end of paragraph (3) is intended to highlight the question whether, in addition to tort receivables, other receivables would have to be excluded (e.g., receivables that are subject to special rules, such as those arising from an independent guarantee or a letter of credit).

8. The scope of the term "monetary sum" has been enlarged so as to include any currency and, possibly, commodities easily convertible into money (A/CN.9/420, para.35). It might need to be further expanded in order to include monetary units of account. A reference to an index indicating prices of commodities at a particular time might need to be added, since the question whether a commodity would be "easily convertible to money" would depend on the market conditions at a particular time.

9. In order to avoid any uncertainty as to whether future receivables are covered by the draft uniform rules, an explicit reference to those receivables has been inserted in paragraph (3) (for a definition of "future receivables", see paragraph (4)). In addition, a reference has been inserted to partial or undivided interests in receivables within square brackets in order to draw the attention of the Working Group to the question whether transactions, such as securitization of undivided interests in receivables, as well as loan participations or loan syndications, should be covered (A/CN.9/420, paras. 180-184).

10. Existing draft articles might need to be modified or new draft articles might need to be added, should partial and undivided interests in receivables be covered. For example, the debtor

protection provisions might need to be strengthened by providing, e.g., that the debtor should not be required to pay a part of an undivided interest to the assignee and the rest to the assignor or to another assignee.

"Future receivable"

11. In view of the fact that the revised definition of the term "receivable" contains an explicit reference to future receivables, it might be advisable to define the term "future receivable". At the previous session of the Working Group, some doubts had been expressed as to whether the draft uniform rules should recognize the entire range of future receivables. The Working Group noted that, in some legal systems, bulk assignments of "conditional" receivables (i.e. receivables that might arise subject to a future event that may or may not take place) and "purely hypothetical" receivables (e.g., receivables that might arise if a merchant is able to establish a business and to attract customers) might run counter to public policy considerations (A/CN.9/420, paras. 53-54).

12. In line with the decision taken by the Working Group, the text in paragraph (4) does not introduce any limitation with regard to the types of future receivables to be covered (A/CN.9/420, para. 55). Should the Working Group decide to limit the range of future receivables covered in the draft uniform rules, certain types of future receivables could be excluded in the definition of "receivable" (draft article 2(3)(b)), with the result that the draft uniform rules as a whole would not apply to such types of receivables. An alternative to that approach would be to introduce such a limitation in draft article 7 dealing with bulk assignments, with the result that only draft article 7 would not apply to bulk assignments of certain types of future receivables.

13. One difficulty in implementing a limitation would be to reach acceptable definitions of the receivables that might be excluded, such as "conditional and hypothetical" receivables. A possible solution might be found in a legal system that recognizes the validity of bulk assignments of future receivables only if the receivables arise within a specified period of time. An alternative approach for the consideration of the Working Group may be found in article 5.5 of the Model Law on Secured Transactions, prepared by the European Bank for Reconstruction and Development (EBRD), which provides that a "class charge", i.e., a security interest in property that is not specifically identified, needs to be registered in order to be valid.

14. It should be noted, however, that introducing a limitation as to the types of "future" receivables to be covered in the text could substantially reduce the usefulness of the draft uniform rules for receivables financing. "Conditional" and "hypothetical" receivables are rather frequently assigned in bulk, even if, in view of the uncertainty as to whether they will ever arise, the amount of credit made available on their basis may be substantially lower than their nominal value. It should also be noted that under the Factoring Convention notification of the assignment of certain future receivables (i.e. receivables arising from contracts not existing at the time of notification) may not be validly given to the debtor (article 9(1)(c)).

"Consumer receivable"

15. The definition of "consumer receivable" in paragraph (5) was inspired by article 2(a) of the Sales Convention. The Working Group might wish to cover receivables arising from consumer transactions, in view of their importance in such transactions as securitization of credit card receivables. In order to address the concerns related to consumer protection, the Working Group

might wish to consider the following two alternative approaches, namely: either to leave the assignee-debtor relationship altogether, or only matters related to consumer protection, to the applicable national law, or to cover that relationship as well while strengthening the position of the consumer-debtor under the draft uniform rules (e.g., by excluding consumer receivables from the scope of draft articles 8 and 16).

"Writing"

16. A definition of the term "writing" would be useful in the context of the following articles: draft article 1(1), if oral assignments were to be excluded from the scope of the text; draft article 5, if oral assignments were to be ineffective towards any party or only towards third parties (Variant B); draft article 13(2)(a) providing for notification of the assignment in writing; and draft article 15 providing for the written consent of the assignee to modifications of the original contract. Paragraph (6) was inspired by article 7(2) of the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (New York, 1995). Its main advantage is that it addresses the need for some form, while at the same time following a flexible approach so as to include modern means of communication.

17. The Working Group might wish to consider paragraph (6) in light of the final text of the draft Model Law on Electronic Data Interchange and Related Means of Communication ("draft Model Law on EDI") to be adopted by the Commission at its twenty-ninth session (New York, 28 May to 14 June 1996).

"Place of business"

18. Paragraph (7), which is intended to apply throughout the draft uniform rules, follows a more flexible approach than the respective provision in the earlier draft (draft article 1(2)) in that it refers to the "relevant contract" (see article 2.2 of the Factoring Convention). The advantage of this formulation is that it results in applying the rule contained in paragraph (7) to all parties, i.e., to the assignment, to the financing contract, if any, and to the original contract. The Working Group might wish to consider adding in paragraph (7) a reference to the seat in order to cover companies which have no fixed place of business, e.g., post-office-box companies.

19. It may be noted that, if a registration-approach were to be adopted in draft article 18, it might be desirable to have a more precise designation of the place where notice of the assignment should be registered.

Article 3. International obligations of the [contracting] [enacting] State

Variant A — This Convention does not prevail over any international agreement which has been or may be entered into and which contains provisions concerning the matters governed by this Convention, provided that the assignor and the debtor have their places of business in States parties to such agreement.

Variant B The provisions of this Law apply subject to any agreement in force between this State and any other State or States.

References: A/CN.9/420, para. 23.

Remarks:

Variant A, which would fit into a convention, is modelled on article 90 of the Sales Convention, while variant B, which could be included in a model law, was inspired by article 1(1) of the UNCITRAL Model Law on International Commercial Arbitration.

Article 4. Principles of interpretation

(1) In the interpretation of this [Convention] [this Law], regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

[(2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based [or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law]].

References: A/CN.9/420, para. 190.

Remarks:

1. Draft article 4 is modelled on article 7 of the Sales Convention. Paragraph (1) is intended to address the issue of the interpretation of the draft uniform rules. Paragraph (2) is aimed at addressing the question of gap-filling, which pursuant to a suggestion made at the previous session of the Working Group should be based on the substantive principles underlying the draft uniform rules rather than on conflict-of-laws rules (A/CN.9/420, para. 190).

2. It should be noted, however, that a different approach, followed in the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit, might be to include conflict-of-laws rules and a rule on interpretation but not a provision on gap-filling. Another approach, which could be followed if the draft uniform rules were to take the form of a convention, might be to combine a rule on gap-filling along the lines of paragraph (2) and the conflict-of-laws rules (draft articles 21-23), with the result that gap-filling would have to be attempted on the basis of the substantive principles underlying the draft uniform rules before resort is sought to the conflict-of-laws rules.

3. The need for a provision along the lines of article 4 would be lesser, if the draft uniform rules were to take the form of a model law, since the law of the State enacting a model law would deal with such issues as interpretation and gap-filling. However, even in a model law, it might be worthwhile attempting to reach a uniform interpretation provision along the lines of draft article 4,

with the exclusion of the bracketed language at the end of paragraph (2), which would not fit into a model law (see article 3 of the draft UNCITRAL Model Law on EDI).

CHAPTER II. FORM AND CONTENT OF ASSIGNMENT

Article 5. Form of assignment

Variant A

An assignment need not be effected or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses.

Variant B

An assignment in a form other than in writing is not effective [towards third parties].

References: A/CN.9/420, paras. 75-79.
A/CN.9/420, draft article 5.

Remarks:

1. Variant A reproduces draft article 5 of the earlier draft of the rules, which was modelled on article 11 of the Sales Convention. The advantage of this approach is that it makes an assignee's right in the assigned receivables independent from formalities. In addition, such an approach would not prejudice the interests of the debtor to the extent that the debtor would be entitled, before notification, to pay the assignor and be discharged. Moreover, such an approach would not prejudice the interests of third parties, provided that a kind of a publicity system would be introduced (e.g., filing of a notice about the assignment in a public registry.

2. Variant B, which has been prepared in response to suggestions made at the previous session of the Working Group (A/CN.9/420, para. 78), provides that purely oral assignments do not produce effects towards any party, or only towards third parties. The exact content of variant B would depend on the determination of what constitutes a "writing" (see draft article 2(6)). In addition to the option presented in variant B, the Working Group might wish to consider whether to include a requirement of writing in the definition of assignment, thus excluding purely oral assignments from the scope of the draft uniform rules.

Article 6. Content of assignment

(1) Subject to the provisions of [this Convention] [this Law]:

(a) an assignment transfers to the assignee the right of the assignor to claim and to receive payment of the assigned receivables; and

(b) an assignment does not have any effect on the debtor's duty to pay other than to pay to the assignee.

(2) Without the debtor's consent, the assignment does not affect the obligations of the assignor arising from the original contract.

Remarks:

1. At the previous session of the Working Group, the view was expressed that the draft uniform rules should expressly state a principle of paramount importance for the protection of the debtor, namely that the debtor should not be disadvantaged as a result of the assignment (A/CN.9/420, para. 101). This fundamental principle is embodied in draft article 6, both in a positive way for the purpose of identifying, in the interest of all parties concerned, the content of the assignment, and in a negative way for the protection of the debtor in particular. Such a provision might alleviate the concerns expressed with regard to including within the scope of the draft uniform rules international assignments of domestic receivables (see draft article 1, remark 9).

2. Paragraph (2), which attempts to further clarify the content of the assignment, is not intended to invalidate other types of assignment, e.g., novation of obligations, or the assignment of a contract as a whole, which are outside the scope of the draft uniform rules.

Article 7. Bulk assignment and assignment of single receivables

(1) One or more, existing or future, receivables may be assigned.

(2) An assignment of one or more, existing or future, receivables that are not specified individually transfers the receivables, if they can be identified as receivables to which the assignment relates, either at the time of assignment or when the receivables become due or are earned by performance.

(3) An assignment of future (...) receivables transfers the receivables (...) directly to the assignee (...), without the need for a new assignment.

References: A/CN.9/420, paras. 45-60.
A/CN.9/420, draft article 3.

Remarks:

"Bulk assignment"

1. The validity of bulk assignments of existing and future receivables, which are the most common ones in receivables financing practice, is questioned in some legal systems on several grounds, including that such assignments unduly restrict the economic autonomy of the assignor or that they are unfair to creditors in the context of the insolvency of the assignor. It is of great

importance, therefore, to recognize the validity of both the agreement to assign and the resulting transfer of receivables (e.g., that a project finance borrower building and operating a toll road may validly assign all toll receipts in order to obtain financing needed for the project).

2. Paragraph (1) is aimed at recognizing the validity of bulk assignments and of assignments of single receivables, while paragraphs (2) and (3) are intended to ensure that such assignments result in the transfer of the assigned receivables. Under paragraph (2), the only condition of validity of the transfer is that the receivables may be identified to the assignment, either at the time of assignment or when they come into existence. In line with the definition of "future receivable" contained in draft article 2(4), the reference to the receivables coming into existence, which was contained in the earlier draft of paragraph (2), has been replaced by a reference to the receivables becoming due or being earned by performance. In addition, paragraph (2) deals with the question of the time at which future receivables are transferred.

3. Paragraph (3) is aimed at settling two questions, namely: the question whether future receivables are transferred directly to the assignee, which is of importance if the assignor becomes insolvent after the assignment but before the receivables come into existence; and the question whether a new assignment is required at the time when the receivables come into existence.

Article 8. No-assignment clauses

(1) Variant A (...) An assignment (...) transfers the receivables to the assignee (...) notwithstanding any agreement between the assignor and the debtor prohibiting or restricting such assignment (...). Nothing in this article (...) affects any obligation or liability of the assignor to the debtor in respect of an assignment made in breach of (...) a no-assignment clause, but the assignee is not liable to the debtor for such a breach.

Variant B An agreement between the assignor and the debtor prohibiting or restricting assignment of receivables is invalid. An assignment transfers the receivables to the assignee notwithstanding such an agreement. Neither the assignor nor the assignee shall have any liability for breach of such an agreement.

[(2) This article does not apply to the assignment of consumer receivables.]

References: A/CN.9/420, paras. 61-68.
A/CN.9/420, draft article 4.

Remarks:

1. Draft article 8 is aimed at covering contractual but not statutory prohibitions of assignment. Variants A and B of paragraph (1) reflect two different approaches in favour of which support was expressed at the previous session of the Working Group (A/CN.9/420, paras. 62 and 67). Variant A is aimed at providing certainty as to the validity of an assignment made in breach of a no-assignment clause. In addition, variant A is intended to ensure that, while the debtor may recover from the assignor any damage suffered as a result of the assignment, it

would not have that remedy against the assignee, since otherwise the assignment could be deprived of any value.

2. Variant B, inspired by article 9-318(4) of the United States Uniform Commercial Code ("UCC"), invalidates a no-assignment clause with the result that an assignment effected in breach of a no-assignment clause would be valid, while the violation of that clause would not give rise to any liability.

3. Paragraph (2) appears within square brackets pending determination of the approach the Working Group might decide to take with regard to consumer protection. It is intended to leave the validity and effectiveness of anti-assignment clauses contained in consumer contracts outside the scope of draft article 8. An alternative approach might be to explicitly subject the application of the draft uniform rules to the applicable consumer protection law, and in addition, to ensure that the position of the debtor-consumer is not unreasonably affected as a result of the assignment (e.g., by providing that in a consumer context, unless the parties agree otherwise, payment of the assigned receivables should always be made to the bank account designated by the assignor and the debtor). Such an approach would be consistent with existing practices (e.g., securitization of credit card receivables) and could ensure that the consumer-debtor could benefit from an increased access to lower cost credit.

4. The Working Group might wish to address the additional question whether an assignee should be able to take a valid assignment in case it has actual knowledge that it violates a prohibition between the assignor and a third party (e.g., a negative pledge by which a borrower undertakes towards a lender providing unsecured finance that the borrower will not create security over its assets in favour of any third party).

Article 9. Transfer of security rights

Unless otherwise provided by a rule of law or by an agreement between the assignor and the assignee, an assignment transfers to the assignee the rights securing the assigned receivables without a new act of transfer.

References: A/CN.9/420, paras. 69-74.

Remarks:

Draft article 10 reflects a decision taken by the Working Group at its previous session that the draft uniform rules should adopt the principle of automatic transfer of security rights, subject to a contrary statutory or contractual provision (A/CN.9/420, para. 74). The Working Group might wish to consider the additional question whether only personal security rights (e.g., guarantees) or proprietary security rights as well (e.g., pledges, mortgages) should be covered in draft article 9.

CHAPTER III. RIGHTS, OBLIGATIONS AND DEFENCES

[Article 10. Determination of rights and obligations

(1) The rights and obligations of the assignor and the assignee arising from their agreement are determined by the terms and conditions set forth in that agreement, including any rules, general conditions or usages specifically referred to therein, and by the provisions of [this Convention] [this Law].

(2) The rights and obligations of the assignor and the debtor arising from the original contract are determined by the terms and conditions set forth in that contract, including any rules, general conditions or usages specifically referred to therein, and by the provisions of [this Convention] [this Law].

(3) The priority between several assignees who obtained the receivables from the same assignor, as well as between the assignee and creditors of the assignor including, but not limited to, the administrator in the insolvency of the assignor, is determined, subject to the provisions applicable to the insolvency of the assignor, by the provisions of [this Convention] [this Law].

[(4) In interpreting the terms and conditions of the assignment, the underlying financing contract, if any, and the original contract and in settling questions that are not addressed by their terms and conditions or by the provisions of [this Convention] [this Law], regard shall be had to generally accepted international rules and usages of receivables financing practice.]]

References: A/CN.9/420, paras. 73, 81, 95.

Remarks:

1. In dealing only with some rights, obligations and defences of the parties (assignor, assignee, debtor and third parties), the earlier draft of the uniform rules was predicated on the assumption that, while the assignor and the assignee could determine their rights and obligations in their contract, the rights, obligations and defences of the debtor and priority among creditors laying a claim on the assigned receivables should be settled to a large extent by reference to rules of law. Draft article 10, which is a new provision, modelled on article 13 of the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit, and appears within square brackets, attempts to explicitly state that understanding and to clarify the relationship between the draft uniform rules, other rules of law and party autonomy.

2. Paragraph (1) recognizes party autonomy with regard to the rights and obligations of the assignor and the assignee and it refers, in addition, to the provisions of the draft uniform rules dealing with the assignor-assignee relationship (e.g., draft articles 11, 12(2) and 21). Paragraph (1) generally refers to the agreement between the assignor and the assignee, without specifying whether that agreement is a distinct agreement or forms part of the underlying financing contract.

3. The reference to usages may be useful in that it codifies internationally acceptable contractual rules and usages governing receivables financing practice (e.g., the Code of International Factoring Customs promulgated by Factors Chain International). On the other hand,

against such a reference, it could be argued that it might introduce uncertainty, since the term "generally accepted" might not be universally understood.

4. Paragraph (2), while recognizing party autonomy, subjects the determination of certain rights and obligations of the assignor and the debtor to the draft uniform rules (e.g., draft articles 13-17). By contrast, paragraph (3), which addresses the issue of priority among competing creditors laying a claim on the assigned receivables, refers to rules of law, since this matter involves the proprietary effects of assignment, a matter normally outside the purview of party autonomy. Paragraph (4) is aimed at settling questions left unaddressed both in the contract and in the draft uniform rules by reference to international contractual rules and usages.

5. Paragraph (4), which appears within distinct square brackets pending determination by the Working Group of the question of the retention or not of draft article 4(2) on gap-filling, might be more useful in a convention than in a model law which would be part of domestic law, which would normally include provisions on gap-filling. Should the Working Group tentatively decide in favour of preparing a convention and to retain a provision along the lines of draft article 4(2), paragraph (4) might be inconsistent with that provision and should be deleted, since the binding character of usages to which parties may have agreed and of practices which the parties may have established between themselves is foreseen in paragraphs (1) and (2) (see also article 9 of the Sales Convention).

Article 11. Warranties of the assignor

(1) Unless otherwise explicitly agreed between the assignor and the assignee (...), the assignor represents (...) that the assignor is, at the time of assignment, or will later be, the creditor, and that the debtor does not have (...), at the time of assignment, (...) defences (...) that would deprive the assigned receivables of value.

(...)

(2) Unless otherwise explicitly agreed between the assignor and the assignee (...), the assignor does not represent (...) that the debtor will perform its payment obligation under the original contract (...).

References: A/CN.9/420, paras. 80-88.
A/CN.9/420, draft article 6.

Remarks:

1. At its previous session, the Working Group recognized that, while the types of warranties given by the assignor to the assignee are a matter of contract, it was useful to include a default rule addressing the question of warranties in the absence of a relevant provision in the assignment (A/CN.9/420, para. 81).

2. Paragraph (1), which merges paragraphs (1) and (2) of the earlier draft, is intended to recognize party autonomy in the allocation of risks between the assignor and the assignee for

defences of the debtor that are unknown to the assignee and, at the same time, to allocate that risk in the absence of agreement by the parties.

3. Paragraph (1) has been redrafted in order to address the concerns that: a variation of the warranty, in particular, by an implied agreement might run against good faith standards; the term "warrants" might introduce uncertainty; the words "in the contract of assignment" might be too restrictive; the words "to the assignee" might inadvertently lead to the conclusion that the warranty exists only towards the immediate and not towards subsequent assignees; referring to existing receivables might introduce uncertainty and inadvertently lead to the exclusion of future receivables; the words "a right to transfer the receivables" might introduce uncertainty since such a "right" would not exist in case of a no-assignment clause; and that subjecting the existence of the receivables to knowledge on the part of the assignor of the defences of the debtor would place on the assignee the risk of defences of the debtor that were unknown to the assignor (A/CN.9/420, paras. 82-87).

4. The term "represents" is used instead of the term "warrants" (A/CN.9/420, para. 83). This term was drawn from article 45(1) of the United Nations Convention on International Bills of Exchange and International Promissory Notes (New York, 1988; "the Bills and Notes Convention") dealing with the warranties given by the transferor of an instrument to the transferee. The words "or will later be" contained in paragraph (1) are aimed at ensuring that future receivables are covered. It should be noted that use of the verb "will" might inadvertently lead to the exclusion of "conditional and hypothetical" receivables, while replacing "will" with the term "might" might render this warranty unnecessary. Paragraph (2) reflects a warranty familiar in most legal systems.

5. The Working Group might wish to consider the additional question whether the consequences of breach of warranties should be dealt with in the draft uniform rules or should be left to other rules of law. The main question that might need to be addressed is whether a fundamental breach of warranties by the assignor would result in the automatic avoidance of the assignment and in the automatic transfer of the receivables back to the assignor, without a new act of transfer.

Article 12. Assignee's right to notify the debtor and to receive payment

(1) (...) Unless otherwise provided in the agreement between the assignor and the assignee, the assignee is entitled to notify the debtor pursuant to article 13 (...) and to request payment of the receivables assigned at the time agreed upon with the assignor and, in the absence of such an agreement, at any time.

(2) If the assignor fails to perform its obligation to pay (...) under the financing contract, the assignee is entitled to notify the debtor and to request payment.

(3) (...) If agreed by the assignor and the assignee or required by law:

(a) the assignee who receives payment from the debtor must account for any amount received in excess of the obligation secured by the assignment; and

(b) the assignor remains liable for any amount by which the payment received by the assignee from the debtor falls short of the obligation secured by the assignment.

References: A/CN.9/420, paras. 89-97.
A/CN.9/420, draft article 7.

Remarks:

1. The title of draft article 12 has been changed in order to correspond to its content (A/CN.9/420, para. 97). Paragraph (1) is intended to reflect the freedom of contract of the parties to define the terms of their contract, including the point of time when the right to notify the debtor and to collect the proceeds of the receivables would be triggered other than upon a breach of the financing contract by the assignor, which is dealt with in paragraph (2). The reference to "default" in paragraph (1) has been replaced by a reference to "failure of performance" for consistency with the terminology used in the Sales Convention. The wording added at the end of paragraph (1) is intended to clarify that the assignee does not merely have a right to notify the debtor but mainly to collect the proceeds of the receivables (A/CN.9/420, paras. 93-94) and that, in the absence of agreement between the assignor and the assignee as to the time of notification, the assignee has the right to notify the debtor and to request payment at any time.

2. Under the current formulation of paragraph (1), the assignee may validly notify the debtor before the breach of the financing contract occurs. The assignee might have a legitimate interest in notifying the debtor and receiving payment before breach of the financing contract occurs, even if such notification was not foreseen in the contract (e.g., in case of problems with the assignor short of a cessation of payments).

3. Under paragraph (2), the assignee is not bound by any agreement with the assignor as to if or when to notify the debtor, since in case of failure on the part of the assignor in the performance of the financing contract the assignee has an interest in acting promptly to collect the assigned receivables in payment of the obligation secured.

4. In line with the position taken by the Working Group at its previous session that it might be inappropriate to draw a distinction between assignments by way of sale and assignments by way of security, paragraph (3) refers instead to accounting by the assignee to the assignor if agreed or required by law, thus leaving that distinction to the parties and to other rules of law (A/CN.9/420, paras. 95-97).

Article 13. Debtor's duty to pay

(1) The debtor is entitled, until the debtor receives notification in writing of the assignment in accordance with paragraph (2) of this article, to pay the assignor and be discharged from liability.

(2) The debtor is under a duty to pay the assignee if:

(a) the debtor receives (...) notification in writing of the assignment by the assignor or by the assignee (...);

(b) the notification contains an unequivocal request for payment and reasonably identifies the receivables assigned, whether existing or future at the time of notification, and the person (...) to whom or for whose account the debtor is required to make payment; and

(c) the debtor has not received notification in writing of a prior assignment, or of measures aimed at attaching the assigned receivables, including but not limited to judgements or orders issued by judicial or non-judicial bodies, as well as of measures effected by operation of law, in particular in case of insolvency of the assignor.

(3) If requested by the debtor, the assignee must furnish within a reasonable period of time adequate proof that the assignment has been made, and unless the assignee does so, the debtor may pay the assignor and be discharged from liability.

(...)

(4) In case the debtor receives notifications of more than one assignment of the same receivables made by the same assignor, the debtor is discharged from liability by payment to the first assignee to notify in accordance with paragraph (2) of this article and has against the assignee the defences provided for under article 14.

(...)

(5) Irrespective of any other ground on which payment by the debtor to the assignee discharges the debtor from liability, payment by the debtor to the assignee discharges the debtor from liability if made in accordance with this article (...).

References: A/CN.9/420, paras. 98-131.
A/CN.9/420, draft articles 9 and 15(2).

Remarks:

1. At the previous session of the Working Group, the concern was expressed that the rule in paragraph (1) failed to establish an appropriate balance between the need for certainty (which would be served by an objective fact for triggering the debtor's duty to pay the assignee, such as notification) and regard for ethical conduct of the parties (which would be served if paragraph (1) were also to introduce a subjective fact, such as knowledge of the assignment by the debtor; A/CN.9/420, paras. 99-104). In order to address that concern, the Working Group might wish to limit the rule embodied in paragraph (1) by a specific reference to provisions of law relating to fraud. It may be noted, however, that such a limitation would be implicit in the draft uniform rules in view of the public policy considerations involved in rules on fraud and of the reference to the need to observe good faith in international trade contained in draft article 4.

2. Paragraph (2) has been revised in order to address the observations and suggestions made at the previous session of the Working Group (A/CN.9.420, paras. 111-123). Under subparagraph (a), the assignee may notify independently of the assignor, while the debtor may request pursuant to paragraph (3) additional information if there is doubt as to whether the assignee is indeed the rightful creditor. However, if the debtor does not request additional information and it is later established that the assignee did not have a right in the receivables, the debtor is exposed to the risk of having to pay twice.

3. Additional language has been inserted in subparagraph (b) in order to ensure that notification relating to future receivables may be given validly (A/CN.9/420, para. 125). The Working Group might wish to consider additional questions, including the questions: whether, in case of several and joint debtors, notification of one or all of them should be required; and whether a mistake in the notification should invalidate it despite the fact that the debtor readily understood which receivables had been assigned and to whom the debtor was supposed to pay.

4. Paragraph (4) in the earlier draft has been moved to draft article 2(6) in view of the need to define "writing" for the purposes of draft articles 5, Variant B, 13 and 15. Paragraph (5) in the earlier draft has been deleted as being superfluous, since the form and the minimum content of the notification is currently being described in paragraph (2).

5. In response to a suggestion made at the previous session of the Working Group that the draft provisions dealing with multiple notifications should be aligned or consolidated, draft article 15(2) in the earlier draft has been moved to paragraph (4) of draft article 13 (A/CN.9/420, para. 169).

6. The new wording, which has been inserted in paragraph (5) (para. (6) in the earlier draft), in order to address a concern expressed at the previous session of the Working Group, was drawn from article 9(2) of the Factoring Convention (A/CN.9/420, paras. 129-131). It is intended to ensure that draft article 13 does not inadvertently result in the exclusion of grounds for discharge of the debtor that might exist under other rules of law. This approach is consistent both with the need to protect the debtor paying the assignee and the need to facilitate assignment by encouraging payment to the assignee.

Article 14. Defences and setoffs of the debtor

(1) In a claim by the assignee against the debtor for payment of the assigned receivables, the debtor may set up against the assignee all defences arising under the original contract of which the debtor could have availed itself if such claim had been made by the assignor.

(2) The debtor may assert against the assignee any right of setoff in respect of claims existing against the assignor in whose favour the receivable arose [or claims existing against the assignee] and available to the debtor at the time notification of assignment conforming to paragraph (2) of article 13 was given to the debtor.

[(3) Notwithstanding paragraphs (1) and (2), defences and setoffs that the debtor could have exercised against the assignor for breach of a no-assignment clause are not available to the debtor against the assignee.]

References: A/CN.9/420, paras. 132-151.
A/CN.9/420, article 10.

Remarks:

1. The order of paragraphs (2) and (3) of the earlier draft has been reversed and the scope of new paragraph (3) has been expanded to cover both defences and setoffs. This was done in order to ensure that the debtor would not be able to raise the breach of a no-assignment clause against an assignee either as a defence or as an independent claim on grounds such as interference with contract rights. In paragraph (2), a reference has been inserted within square brackets for the consideration of the Working Group to defences that the debtor might have against the assignee based on separate dealings between the debtor and the assignee. Paragraph (3) has been placed within square brackets pending a decision of the Working Group on no-assignment clauses (draft article 8).

2. The Working Group might wish to consider the question whether the words "all defences" includes a defence based on a misrepresentation made before the conclusion of the original contract and a defence based on a contract which modified the original contract (for modifications of the original contract, see draft article 15).

Article 15. Modification of the original contract

A modification of or a [substitution for] [novation of] the original contract shall be binding on the assignee and the assignee shall acquire corresponding rights under the modified or new contract, provided that it is foreseen in the agreement between the assignor and the assignee or is later consented to by the assignee in writing.

Remarks:

1. Draft article 15 sets forth a new provision inserted pursuant to a suggestion made at the previous session of the Working Group to consider the extent to which the assignee should be bound by modifications in the original contract agreed upon by the assignor and the debtor after the conclusion of the assignment, or even after notification (A/CN.9/420, para. 109). It is intended to counterbalance, on the one hand, the need to recognize the contractual freedom of the assignor and the debtor to modify their contract in order to address changing commercial realities and, on the other hand, the need to protect the assignee from changes in the original contract that might affect its right to payment.

2. The effect of draft article 15 would be that, if the assignor and the debtor modify the original contract without the general or specific approval of the assignee, such a modification would not be valid towards the assignee. As a result, the assignee would be entitled to claim payment from the debtor based on the original contract in its initial version.

3. The Working Group might wish to consider limiting the scope of draft article 15 to cases in which a modification would be necessary to avoid frustration of the original contract (e.g., if the performance of the original contract becomes impossible due to an unforeseen impediment beyond

the control of the parties; see article 79 of the Sales Convention). It may be noted that, under article 9-318(2) UCC, a modification of the original contract is effective against the assignee if "made in good faith and in accordance with reasonable commercial standards".

Article 16. Waiver of defences

(1) For the purposes of this article a waiver of defences is an explicit written agreement by the debtor with the assignor or the assignee according to which the debtor undertakes not to assert against the assignee the defences that it could raise under article 14.

(2) A waiver of defences, (...) made at the time of the conclusion of the original contract or thereafter, shall (...) preclude the debtor from asserting defences [(...) the availability of which the debtor knew or ought to have known at the time of waiver].

(3) The following defences may not be waived:

(a) defences arising from separate dealings between the debtor and the assignee;

(b) defences arising from fraudulent acts on the part of the assignee;

[...]

(4) A waiver of defences may only be revoked by an explicit written agreement.

[(5) A written and explicit indication of consent of the debtor to the assignment after notification is deemed to be a waiver of defences.

(6) The provisions of this article shall not apply to assignments of consumer receivables.]

References: A/CN.9/420, 136-144.
A/CN.9/420, draft article 11.

Remarks:

1. The term "waiver of defences" is defined in paragraph (1) in order to avoid introducing uncertainty as to its meaning. The Working Group might wish to clarify that a waiver may be agreed, before notification, between the debtor and the assignor and, after notification, between the debtor and the assignee.

2. The first set of words underlined in paragraph (2) is aimed at implementing a suggestion made at the previous session of the Working Group (A/CN.9/420, para. 138). The second set of words underlined is intended to describe the result of a waiver without using the terms "valid", "effective", or "enforceable", the meaning of which might not be universally understood. In paragraph (3), further defences that may not be waived could be listed (see article 30 of the Bills and Notes Convention).

3. Paragraph (5), which has been inserted pursuant to a suggestion made at the previous session of the Working Group, provides for an implied waiver of defences in case of acceptance of the assignment by the debtor. It appears within square brackets, since it might be inconsistent with the principle embodied in paragraph (1) that, in order to protect the debtor from unintentionally waiving defences, any waiver of defences should be explicit. Paragraph (6) also appears within square brackets pending determination of the approach the Working Group might wish to take with regard to consumer receivables.

Article 17. Recovery of advances

(1) Without prejudice to the debtor's rights under article 14, failure of the assignor to perform (...) the original contract (...) does not entitle the debtor to recover a sum paid by the debtor to the assignee (...).

(2) An assignment shall not prejudice the debtor's rights against the assignor arising from the failure of the assignor to perform the original contract including, but not limited to the right of the debtor to recover from the assignor sums paid by the debtor to the assignee.

References: A/CN.9/420, paras. 145-148.
A/CN.9/420, draft article 12.

Paragraph (1) is aimed at ensuring that the debtor bears the risk of non-performance of the obligations of its contractual partner, i.e. the assignor, while preserving the defences that the debtor may assert against the assignee under draft article 14. Paragraph (2), inserted pursuant to a suggestion made at the previous session of the Working Group, is intended to preserve the rights of the debtor against the assignor for breach of the original contract, in particular the right to recover from the assignor advance payments made by the debtor to the assignee.

Article 18. Priority

(1) Where a receivable is assigned by the assignor to several assignees, the [first assignee] [the first assignee to notify the debtor pursuant to article 13] [the first assignee to register the assignment] has priority.

(2) The assignee has priority over creditors of the assignor, provided that [the assignment] [notification of the debtor] [registration of the assignment] occurred prior to the time at which the creditors of the assignor acquired a right in the assigned receivables.

(3) In case of insolvency of the assignor, the assignee has priority over the insolvency administrator, provided that [the assignment] [notification of the debtor] [registration of the assignment] occurred before the effective date of the insolvency proceedings.

[(4) [Without prejudice to other rules of law relating to priority], the preceding paragraphs shall not apply in the following cases: [...]]

[(5) The assignee may register at a public register in the location of the assignor a summary statement, which reasonably identifies the assignor, the assignee, the assigned receivables and the secured obligation, if any. In the absence of registration, [the first assignee] [the first assignee to notify the debtor] has priority, subject to paragraphs (2) and (3) of this article].

(6) For the purposes of this article, priority means the right of a person to satisfy its claim against the assignor on the basis of the assigned receivables in preference to other persons.

(7) Nothing in this article affects any provisions applicable to the insolvency of the assignor.

References: A/CN.9/420, paras. 149-164.
A/CN.9/420, draft article 14.

Remarks:

1. Uncertainty with regard to priority constitutes an important obstacle to receivables financing since creditors may withhold credit or make credit available at a higher cost, if they are not certain that they will be accorded priority, in particular in case of insolvency of the assignor. Draft article 18 is, therefore, of paramount importance for a text aimed at increasing the availability of credit.

2. Variants A, B and C of the earlier draft have been consolidated in paragraphs (1) to (3). The rule originally presented in variant D has been included in chapter V dealing with conflict-of-laws issues (draft article 23). Paragraphs (1) to (3) deal with different conflicts of priority. Paragraph (1) deals with conflicts of priority between several assignees of the same assignor ("dual assignments"). The Working Group felt that such dual, whether fraudulent or unconscionable, assignments should be dealt with separately from successive assignments by the initial or any subsequent assignee, since they essentially raise an issue of priority or validity (A/CN./420, para. 167). Paragraph (2) deals with conflicts between the assignee and the assignor's creditors attaching the assigned receivables, while paragraph (3) deals with conflicts between the assignee and the administrator in the insolvency of the assignor.

3. It should be noted that a priority rule based on notification of the debtor would be unsuitable in bulk assignments of existing and future receivables, taking place, e.g., in securitization of consumer credit card receivables, since, for cost and time reasons, the assignee could not possibly notify the hundreds or thousands of debtors often involved in such assignments, even if their identity were known.

4. The Working Group might wish to address the additional question whether an assignee who has actual knowledge of an earlier unnotified or unregistered assignment should obtain priority by notifying or by registering first (for a discussion of the question notification vs. knowledge in the context of the provision dealing with the debtor's duty to pay, see A/CN.9/420, paras. 99-104). In determining which approach to follow, the Working Group might wish to weigh the need for certainty against the need to preserve acceptable standards of conduct in practice.

5. Paragraph (4) (paragraph (2) in the earlier draft) has been placed within square brackets pursuant to the concerns expressed at the previous session of the Working Group that a general

exception to the priority rule in paragraph (1) could compromise the certainty of such a priority rule and thus have an adverse impact on the cost of credit (A/CN.9/420, paras. 161-164). The Working Group might wish to consider alternative ways in which competing claims of suppliers of the assignor and assignees providing finance to the assignor might be addressed.

6. Paragraph (5), which appears within square brackets pending consideration by the Working Group of the priority rule in paragraphs (1) to (3), supplements a regime based on registration by providing a priority rule to cover the case in which there may be unregistered assignments (A/CN.9/420, para. 157).

7. Compared with the earlier draft, a more flexible approach is followed in paragraph (5) with regard to the determination of the place where the assignee needs to register, in that reference is made to the location, and not to the place of business, of the assignor. Should that approach be preferred, consideration should be given to the question whether the assignor would be considered as being located in the State where it is organized, or in the State where its executive offices or its principal assets are located. If either of the last two alternatives were chosen, the issue of a change in the location of the assignor would need to be addressed.

8. If the Working Group were to follow a registration-based approach, additional provisions would be needed, depending on whether a convention or a model law would be preferred. If the draft uniform rules were to take the form of a convention, reference could be made in the convention to existing registries, e.g., companies registries, possibly linked internationally with an electronic system of communications, or to an international registry that would need to be established.

9. Issues relating to the operation of the register, such as authentication of documents and liability of the registrar, would, in the former case, have to be left to the law of the State where registration occurs, while, in the latter case, they would need to be addressed in the convention. If a model law were to be preferred, a comment would need to be added that States wishing to adopt the model law would need to establish registration requirements and registers as they may consider appropriate (for general arguments in favour of a convention or a model law, see article 1, remarks 15-17).

10. In view of the wide divergences existing among the various legal systems with regard to the rights of secured and unsecured creditors, it might be difficult to achieve consensus on the detailed meaning of the term "priority". However, it might be useful to attempt to describe priority in a generic way along the lines set out in paragraph (6). As presently drafted, paragraph (6) would apply to draft article 18 only. If the reference to priority were to be retained in draft articles 10(3) and 23, the definition of the term "priority" would have made to apply to those provisions as well.

11. Paragraph (7) is by no means a final resolution of the problem of the relationship between the draft uniform rules and the provisions applicable to the insolvency of the assignor (whether contained in an insolvency code or in any other body of law), but is intended to raise the question of the relationship of the draft uniform rules and the provisions applicable to the insolvency of the assignor for the consideration of the Working Group. It should also be noted that the scope of the rule in paragraph (7) might need to be expanded in order to apply to the draft uniform rules as a whole.

Article 19. Payment to a specified bank account and priority

(1) If agreed between the assignor and the debtor before notification of the assignment pursuant to paragraph (2) of article 13, the debtor is entitled to pay into a bank account or a post office box specified in the agreement and be discharged from liability. After notification of the assignment pursuant to paragraph (2) of article 13, the debtor and the assignee may agree on the method of payment.

(2) In case of an agreement between the assignor and the debtor pursuant to paragraph (1) of this article, the person in control of the bank account or the post office box specified in the agreement for the purpose of payment by the debtor has priority.

References: A/CN.9.420, paras. 65, 92, 183.

Remarks:

1. At the previous session of the Working Group, reference was made to contractual arrangements pursuant to which the debtor may be required to continue making payments to a bank account or to a post office box designated by the assignor, even after the assignment or the notification of the debtor. Draft article 19 is intended to codify such an arrangement.

2. Such an approach presents a number of advantages, including: that the assignor may assign its receivables in order to obtain credit without the assignment being publicized, since the assignor and the assignee may negotiate among themselves the issue of the control over the bank account or the post-office box; that the assignment does not necessarily change the position of the debtor; and that it might provide a simple and clear solution to the issue of priority.

3. On the other hand, such an approach has certain drawbacks, including: that the assignee could not determine certain matters related to the bank account, e.g., the bank with which the account is to be held or the type of the account, which might have an impact on the interest rate to be applied; the assignee would need to obtain control of the bank account or post office box before, e.g., the effective date of the insolvency of the assignor, in order to be protected; and the entity with which the account might be held might be exposed to the risk of being sued as an "agent" of the assignor or the assignee.

CHAPTER IV. SUBSEQUENT ASSIGNMENTS

Article 20. Subsequent assignments

(1) [This Convention] [This Law] applies to any assignment (...) by the initial or any other assignee to subsequent assignees, provided that [the initial] [such] assignment is governed by [this Convention] [this Law].

(2) (...) [This Convention] [this Law] (...) applies as if the subsequent assignee were the initial assignee. However, the debtor may not assert against a subsequent assignee rights of setoff in respect of claims existing against an earlier assignee[, with the exception of rights existing against the penultimate assignee who is the ultimate assignor].

(3) Variant A A subsequent assignment of receivables (...) transfers the receivables to the assignee notwithstanding any agreement (...) prohibiting or restricting such assignment (...). Nothing in this paragraph affects any obligation or liability of a subsequent assignee for breach of a no-assignment clause.

Variant B An agreement (...) prohibiting or restricting assignment of receivables is invalid. An assignment of a receivable transfers the receivables to the assignee notwithstanding such an agreement. Neither an assignor nor an assignee have any liability for breach of such an agreement.

(4) Notwithstanding that the invalidity of an intermediate assignment renders all subsequent assignments invalid, the debtor may pay the first assignee to notify pursuant to paragraph (2) of article 13 and be discharged from liability.

References: A/CN.9/420, paras. 188-195.
A/CN.9/420, draft article 15.

Remarks:

1. In response to a view, which was widely shared at the previous session of the Working Group, draft article 20 has been revised so as to apply exclusively to successive assignments by the initial or any subsequent assignee and not to dual assignments by the assignor as well (A/CN.9/420, para. 167). Draft articles 13(4) and 18(1) should be sufficient in dealing respectively with multiple notifications of fraudulent or unconscionable dual assignments and with the issue of priority among several assignees who obtained the receivables from the same assignor.

2. It should be noted that it may be necessary to clarify that the initial assignment in securitization transactions is the assignment from the party in whose favour the receivables arose from the original contract. Otherwise, the reference to the "initial" assignment may be misread as indicating the assignment between affiliated companies in the same State and in which the draft uniform rules would not apply, if domestic receivables are involved. As a result of the reference to the draft uniform rules as a whole in paragraph (2), the subsequent assignee would have to follow the same procedure as the initial assignee in order to establish priority (A/CN.9/420, para. 172).

3. The language added at the end of paragraph (2) is intended to reflect a suggestion made at the previous session of the Working Group (A/CN.9/420, para. 171). It may be noted that, if that language were to be retained, the legal position of the debtor would be improved as a result of the assignment in that the debtor would have against the ultimate assignee not only the rights existing against the assignor pursuant to draft article 14(2), but also the rights existing against the penultimate assignee. In such a case draft article 6(1)(b) embodying the principle that assignment should neither worsen nor improve the debtor's legal position would need to be revised.

4. The variants presented in the context of draft article 8 with regard to no-assignment clauses are reproduced in paragraph (3) with the necessary adjustments. Paragraph (4) is aimed at ensuring that the invalidity of an assignment in a chain of assignments does not affect the certainty necessary for the debtor to pay and discharge its obligation.

5. The Working Group might wish to consider inserting in draft article 20 a provision along the lines of article 11(2) of the Factoring Convention, which is intended to address the uncertainty in international factoring as to whether notification of the assignment by the export factor to the import factor constitutes also notification of the assignment by the assignor to the export factor.

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[CHAPTER V. CONFLICT OF LAWS

The conflict-of-laws provisions contained in document A/CN.9/412 have been revised in view of the deliberations of the Working Group at its previous session (A/CN.9/420, paras. 185-201). They appear within square brackets pending determination by the Working Group of a number of questions, including: the question whether the text being prepared should take the form of a convention or a model law; and the question whether the scope of the conflict-of-law provisions should be the same as the scope of the substantive-law provisions or wider, as in the Convention on Independent Guarantees and Stand-by Letters of Credit (article 1(3)). With regard to the decision of the Commission for a closer cooperation with the Hague Conference on Private International Law on the conflict-of-laws aspects of assignment, the Working Group might wish to consider ways in which such cooperation could take place (e.g., the holding of joint meetings of experts on issues of common interest related to assignment of receivables). [2/]

[2/] Report of the United Nations Commission on International Trade Law on the work of its twenty-eighth session (1995), Official Records of the General Assembly, Fiftieth Session, Supplement No. 17, A/50/17, paras. 379 and 380.

Article 21. Law applicable to the relationship between assignor and assignee

(1) With the exception of matters which are settled in this Convention (...), the transfer of a receivable as between the assignor and the assignee is governed by the law governing the receivable to which the assignment relates.

(2) With the exception of matters which are settled in this Convention (...), the relationship between the assignor and the assignee , including, but not limited to, the validity of the assignment (...) is governed by the law [expressly] chosen by the assignor and the assignee (...).

(3) In the absence of a [valid] [express] choice (...), the relationship between the assignor and the assignee (...), including, but not limited to, the validity of the assignment, to the extent that it is not settled in this Convention, is governed by [the law of the State in which the assignor has its place of business] [by the law of the country with which the assignment is most closely connected].

[(4) Unless the assignment is clearly more closely connected with another country, it is deemed to be most closely connected with the country where the party who is to effect the performance which is characteristic of the assignment has, at the time of conclusion of the assignment, its place of business].

References: A/CN.9/420, paras. 188-196.
A/CN.9/420, draft article 8.

Remarks:

1. Paragraph (1) is intended to distinguish between the contractual effects of assignment, which could be governed by the law chosen by the assignor and the assignee, and the proprietary effects of assignment, which should be beyond the purview of party autonomy. Paragraph (1) is based on the principle that the transfer of a receivable should be governed by the same law under which that receivable came into existence in the first place. The word "expressly" in paragraph (1) of article 8 of the earlier draft has been deleted, since pursuant to draft article 4 issues that are not "expressly" addressed in the rules are to be settled by reference to the principles underlying the draft uniform rules.

2. The reference to the "rights and obligations" of the assignor and the assignee in paragraph (2) has been replaced by a more general reference to "the relationship between the assignor and the assignee". It should be noted that the Convention on the Law Applicable to Contractual Obligations (Rome, 1980; "the Rome Convention") refers to the "mutual obligations of assignor and assignee under a voluntary assignment", and does not address the question of the transfer of receivables (article 11). In paragraph (2), a choice has to be made between express and implied choice of law by the parties.

3. Paragraph (3) presents two alternatives, one based on the place of business of the assignor, which is aimed at ensuring certainty, and another, more flexible one based on the country with which the assignment is "most closely connected", which was drawn from article 4 of the Rome

Convention. It should be noted that the Rome Convention refers to the law of a "country" rather than to the law of a "State".

Article 22. Law applicable to the relationship between assignee and debtor

With the exception of matters which are settled in this Convention, (...) the relationship between the assignee and the debtor, including, but not limited to, the right of the assignee to notify the debtor and to receive payment, the duty of the debtor to pay the assignee and be discharged from liability and the defences of the debtor towards the assignee, is governed by the law [governing the receivable to which the assignment relates] [of the State where the debtor has its place of business]. (...)

References: A/CN.9/420, paras. 197-201.
A/CN.9/420, draft article 13.

Remarks:

1. The scope of draft article 22 has been revised in order to be aligned with the scope of article 12.2 of the Rome Convention. As to the applicable law, article 22 presents two alternatives, one based on the law governing the receivable and another based on the law of the State of the debtor's place of business. The main advantage of the first alternative, which is consistent with article 12.2 of the Rome Convention, is that it follows the generally accepted principle that the assignment should not alter the position of the debtor, except to the extent permitted by the law under which the debtor undertook an obligation towards the assignor.

2. On the other hand, the main disadvantage of such an approach is reduced certainty and predictability, since in receivables financing the original contract often does not exist at the time of assignment. In addition, the assignee might be faced with the situation of being unable to enforce the assignment against the debtor despite the fact that it might have met the requirements of the law governing the original contract.

3. Providing a solution to the problem of enforcement is the main advantage of the second solution, which, however, also presents some drawbacks, namely that: the debtor's identity might not be known at the time of assignment; a bulk assignment would have to comply with the law of several countries where various debtors might be located; and the situation of enforcement in a country where the debtor might have assets would not be covered.

[Article 23. Law applicable to priority

Priority of an assignee over subsequent assignees who obtained the assigned receivables from the same assignor and over the assignor's creditors, including, but not limited to, the administrator in the bankruptcy of the assignor, is governed by the law of the State where the [assignor] [debtor] has its place of business.]

References: A/CN.9/420, paras. 154 and 201.
A/CN.9/420, article 14, Variant D.

Remarks:

1. Draft article 23 appears within square brackets, since it is intended to serve as an alternative to draft article 18 in case no consensus were to be reached on a substantive-law provision dealing with priority. It requires a choice to be made between two connecting factors, the place of business of the assignor and the place of business of the debtor. The place of business of the assignor presents as a connecting factor the advantage of simplicity and predictability for a number of reasons, including that: it provides a single point of reference; it could be ascertained at the time of even a bulk assignment; and that it would be suitable even to legal systems where registration is practiced (assignees would normally look to the place of business of the assignor to ascertain the status of receivables). In addition, such an approach would have the advantage that it would result in the application of the law that would govern the insolvency proceedings of the assignor, if those proceedings were opened in the State of the assignor's place of business or in a State that would have adopted the draft uniform rules.

3. The main disadvantage of an approach based on the place of business of the assignor is that priorities may be characterized variously, as issues of contract, tort, property, insolvency, or procedural law, and thus may be subject to other applicable law, which would most likely be the law of the country in which enforcement is sought. The problem of characterization may be overcome somewhat if the law of the country where the debtor has its place of business were applicable, since it would tend to be the law of the country where enforcement could be sought. It should be noted, however, that even the country of the debtor's place of business would not provide a solution that would cover all cases (e.g., cases in which enforcement was sought in the country in which the insolvency of the assignor is opened, or in which enforcement was sought in a country where assets of the debtor are located).

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